The Solicitors' Journal

VOL. LXXXVI. **Saturday, October 10, 1942.** No. 41

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1403.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 4d., *post free*.
ADVERTISEMENTS: Advertisements must be received not later than first post Tuesday, and be addressed to The Manager at the above address.
CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.

Current Topics.

A New Judge.

ON 29th September the Lord Chancellor moved in the House of Lords that "an humble address be presented to His Majesty representing that the state of business in the Probate, Divorce and Admiralty Division requires that a vacancy in the number of puisne judges should be filled, and praying that His Majesty will be graciously pleased to fill such vacancy accordingly, in pursuance of the Supreme Court of Judicature (Amendment) Act, 1937." The vacancy resulted from the recent tragic death of the late Mr. Justice LANGTON, whose loss was so deeply deplored. The measure of his loss to the Probate, Divorce and Admiralty Division in actual work to be done was revealed by his lordship in figures which he gave to the House. As a result of the Matrimonial Causes Act, 1937, extending the grounds for divorce, the number of divorce cases immediately following 1937 increased, and there were also at that time heavy arrears of cases awaiting trial. Since that date, therefore, there had been a President and four puisne judges, instead of three, as formerly was the case. At the present moment there are, the Lord Chancellor said, awaiting trial 935 defended cases of divorce, as against 976 at the corresponding date in 1937, and in addition there were 673 defended cases awaiting trial, as against 550 at the corresponding date in 1937. At the moment, so far as matrimonial causes were concerned, the division had gained the not very satisfactory position which it occupied before the 1937 legislation came into operation. There was also a consideration with respect to Admiralty cases in war-time which needed emphasis. When ships sailed in convoy and without lights, Admiralty litigation increased, as experience showed both in the last war and in this. It was essential to deal promptly with Admiralty cases, so that they could be taken as soon as the necessary witnesses were available while their ship was in a home port. That was one of the contributions which the law could make to the quick turning round of ships, so that men could be released for the purpose of further serving their country. The address was supported by LORD MAUGHAM, LORD WRIGHT and LORD CLAUSON, all of whom also associated themselves with the Lord Chancellor's words concerning the late Mr. Justice LANGTON. An address, moved by the Attorney-General, was agreed to in the Commons to the same effect on 1st October. On going to press we learn that the King has approved the appointment of Mr. G. St. CLAIR PILCHER, M.C., K.C., to be a judge of the Probate, Divorce and Admiralty Division.

Courts (Emergency Powers) (Amendment) Bill.

THERE has been a little inevitable delay owing to the vacation in passing the Courts (Emergency Powers) (Amendment) Bill through all its stages, but progress is again being made, and on 29th September the Bill was read a second time in the Commons, considered in Committee, reported with amendments, read the third time, and passed with amendments. The Attorney-General said that the Bill dealt with two short technical and wholly uncontroversial points. In the original Act the persons entitled to the benefit of its provisions were described in the general words as the persons liable to pay the debt or perform the obligation which was sought to be enforced. He then referred to the facts of cases like *In re Midland Bank's Application* (*No.* 2) [1941] 1 Ch. 350 and *Woolwich Equitable Building Society's Application* (1942), 111 L.J. Ch. 105, in which it had been held that the assignee of a mortgagor or the trustee in bankruptcy of a mortgagor were not persons liable to pay the debt or perform the obligation. He also referred to the case where a farmer mortgages property to secure a debt, not of his own, but of his son or his wife, and therefore did not come within those words. It was therefore proposed to introduce general words empowering the courts to protect anyone who might have an interest in the property which should entitle him to protection. It was a little difficult to be certain how those cases would arise, and it was not desired to bring about a situation in which costs would be increased by the creditor having to serve notice on a variety of persons who might be interested. It was therefore provided that rules should be made to keep the matter within a proper compass. Apparently in the last resort, as Major MILNER said in his speech, the courts may decide on the persons who are to be made parties to the application. The second point, the Attorney-General said, was a small improvement designed to save costs. Under the original Act, if a mortgagee desired to exercise the remedy of foreclosure, he had to get leave before he started, but if he simply required to get possession of the mortgaged property, he could start proceedings for possession without leave. It was only when he got possession that the question arose: "Is this a case where the occupier of the mortgaged property ought to have protection under the Act?" The new provision aimed at saving costs by providing that if the mortgagee wanted to get possession he had to get leave before he began, so that at that stage, instead of later, the question whether there was any Courts (Emergency Powers) Act defence to the exercise of his rights could be investigated. Lawyers will welcome the Attorney-General's statement that when the Bill is passed it is hoped to consolidate the complicated provisions of the Acts. There will also be much support for Major MILNER'S plea for consolidation of other Acts, such as the Rent Acts, which, as he said, are extremely difficult to follow in their present form.

Compensation for Road Accidents.

IN a memorandum, recently submitted by the Pedestrians' Association to the Beveridge Committee on Social Insurance and Allied Services, attention is drawn to a problem which is as serious in war as in peace, that of compensation for road accidents. The magnitude of the problem is illustrated by figures which show that during the eleven years ending with 1938 an average of some 6,750 persons were killed and 206,620 were injured on the roads in each year; in mines and quarries about 995 were killed on an average in each year and 148,000 injured; and in other industrial accidents an average of some 850 killed and 147,290 injured in each year. The proportion of seriously injured was very much higher for road accidents than mining accidents. The memorandum contrasts the rule of absolute liability in workmen's compensation with the necessity of proving negligence in road accident cases, and emphasises the fact, well known to every advocate in running-down cases, that a road accident happens so quickly that it is often impossible to describe the exact sequence of events with accuracy. It is also pointed out that the pedestrian is often at a disadvantage compared with the motorist as regards the collection of evidence, as he is unconscious, or too dazed to act. After a reference to LORD DANESFORT'S Bill of 1932, which passed through all its stages in the Lords and only failed to be introduced into the Commons owing to a defeat of the Government of the day, the memorandum quotes the recommendation of the Law Revision Committee in 1939, that "in cases where damage has been caused by the fault of two or more persons, the tribunal trying the case (whether that tribunal be a judge or jury) shall apportion the liability in the degree in which each party is found to be in fault. The Association recommends (*a*) the modification of the law of negligence so that where both sides in an accident are negligent, part damages should be awarded, following the rule in the Admiralty Court, and where neither side is at fault, the driver whose vehicle did the damage should pay for it; (*b*) the provision of an alternative remedy on the lines of the Workmen's Compensation Acts so that persons injured or the dependents of those killed may be entitled to compensation up to a limited amount

apart from any question of negligence or fault. The Association argues that just as the introduction of machinery into industry created an industrial risk, the use of mechanically propelled vehicles, driven at four or five times the speed of horse-drawn vehicles, introduced a new risk on the highways, and as the use is for the benefit and convenience of their owners—largely for their pecuniary advantage—there seems no reason either in logic or in fairness why this principle should not be extended to road accidents; (*c*) the attachment of a policy of insurance to a vehicle so that if a vehicle is involved in an accident, there is insurance cover irrespective of who the driver may be and of the circumstances under which he is driving; (*d*) where no policy exists or where the driver is untraced, compensation shall be paid from a fund like the one already operated in New Zealand, to which all the insurance companies should contribute. If the insurance companies can operate with conspicuous success such schemes as those under the War Damage Act, it seems very little to ask that they should manage a scheme of social insurance such as that envisaged in the memorandum, which aims at dealing with one of the most serious menaces of modern life. The Pedestrians' Association has performed an important public service in preparing their new memorandum.

Prisoners of War.

IT is always heartening to hear of amenities being provided for prisoners of war in the various "oflags" and "stalags" of Germany, and we are therefore glad to record a few items of news from the recent report of the Educational Department of the Red Cross and St. John War Organisation, a fuller account of which will be found in *The Law Society's Gazette* for September. Among its other activities, the organisation co-operates with professional, technical and commercial organisations, of which The Law Society is one, in supplying technical books and information as to careers and employment generally after the war. Most of the bodies co-operating with the organisation have prepared courses of study, and in many cases their examinations may be taken by prisoners in the camps, under proper invigilation. A number of entries for The Law Society's Intermediate and Final Examinations to be held in prison camps in Germany, have, according to *The Law Society's Gazette*, been received, and arrangements for holding the examinations are proceeding. All possible assistance is rendered by the Red Cross in forming camp libraries and assisting those conducting "camp universities." At Oflag VIB one of the prisoners is a law don from Trinity, Cambridge, and there are five other "faculties" besides the law "faculty," and twenty sub-divisions. Excellent results have been achieved as a result of appeals for books by the Council of The Law Society published in the *Gazette* from time to time, and all the books presented by members of the Society have been duly despatched. Altogether 50,000 educational books in the seventy-one subjects most in demand have been sent to Geneva to form a reserve from which books can be sent at once as required in order to save delay. At present technical and commercial books are most in demand, but prisoners also ask for good copies of the English classics and modern books. Only new books may be sent to Italy, but the German camps admit second-hand books, provided that all marks are removed. It is important, particularly in connection with gifts of law books, to bear in mind that only up-to-date editions of technical works are of any use. The expenditure on books alone is £1,000 a month, although expenses are cut to a minimum. Among donations received has been one of £50 from The Law Society. Solicitors who still have books that they wish to employ in this, the best of services to which they can put their books, should send them to the Council of The Law Society.

Stamp Duties.

TWO rulings on stamp duties of interest and importance to practising solicitors are set out in *The Law Society's Gazette* for September. One is the result of information delivered by the Lord Chancellor's Department to county court registrars with regard to "passing through" the county court books any payments made direct by the debtor to the creditor in county court actions. As a matter of common practice the creditor gives an acknowledgment to the court, on a form of slip receipt, showing that he has received the money direct from the debtor. The information now given by the Lord Chancellor's Department is that where items of £2 or over are being "passed through" in this way, the acknowledgment does not attract a 2d. stamp. The other item of news concerning stamp duties relates to the prescribed form of statutory declaration by the owner of goods sold, as provided by the General Licence (S.R. & O., 1942, No. 897) issued by the Chairman of the Central Price Regulation Committee under the Sales by Auction (Control) Order, 1942. The Council of The Law Society learn that following representations made by the Auctioneers' and Estate Agents' Institution, the Board of Inland Revenue have decided that statutory declarations made under the General Licence, whether before a commissioner for oaths or a justice of the peace, are exempt from stamp duty. Persons wishing to claim repayment of stamp duty already paid on such declarations should apply to the office of the Controller of Stamps, Inland Revenue, Grand Hotel, Llandudno, and quote as authority the Inland Revenue's letter CSX 490/42 of the 30th June, 1942.

Disclosure of Scrap Metal.

BEFORE 21st October, builders, manufacturers and others will have to give careful consideration to the question what is scrap metal, for under S.R. & O., 1942, Nos. 761 and 1723, made under reg. 56AAA of the Defence (General) Regulations, 1939, the occupier of every premises in Great Britain must, before that date, furnish to the Minister of Works and Planning on a prescribed form a return of any accumulation on those premises of three tons or more of metal suitable for scrap. Subsequently they must likewise keep the Ministry informed within thirty days of any subsequent date on which such an amount of metal is brought on to the premises. Metal suitable for scrap is any metal, ferrous or non-ferrous, other than aluminium or magnesium or their alloys, which is, or forms part of any building, structure, plant or article which is not in use, is obsolete or redundant, or is otherwise serving no useful purpose. Slot machines on railway stations have been given as an example of the last type of scrap. "Premises" means any building or land having an assessment under Sched. A, or subject to a valuation for rating. In the case of empty premises, the person entitled to occupy the premises must make the return. No returns are required where (i) A return has already been made from premises in those areas specified in the Scrap Metal (No. 1) Order, S.R. & O., 1942, No. 761. (ii) The Board of Trade or the Ministry of Food certify that the metal is, or forms part of, machinery or plant which is disused or spare in consequence of a concentration scheme approved by either of them. (iii) The metal forms part of: a machine tool of any of the descriptions specified in Sched. I to the Control of Machine Tools (No. 9) Order, 1941, or a cutting tool of any of the descriptions specified in Sched. I to the Control of Machine Tools (Cutting Tools) (No. 1) Order, 1942, or any order replacing or amending them. (iv) Returns in respect of the metal are already made to the Iron and Steel Control under the Industry (Records and Information) No. 1 Order, 1940, or No. 2 Order, 1942. (v) The metal forms part of stand-by plant or equipment held by public utility undertakings and is essential for the performance of the statutory obligations of those undertakings or which is held by them for the purposes of ss. 40, 42, 59 or 60 of the Civil Defence Act, 1939. The new order is an extension of an order made on 14th May, requiring a like return from premises in the London civil defence region, the counties of Essex, Dorset, Nottingham, Monmouth, East, West and Midlothian, and the county boroughs of Bristol and Leeds. No machinery or plant will be taken where it is important to preserve it for post-war use, and the owner has a right of appeal. Moreover, compensation is payable where scrap is actually requisitioned. Forms for the making of returns are obtainable from "Scrap Recovery," Ministry of Works and Planning, Sanctuary Buildings, Great Smith Street, S.W.1. It has been stated that the metal situation is serious, 80,000 to 90,000 tons per week being wanted, and as a result of the new order it is expected that 1,000,000 tons will be produced.

Recent Decisions.

In *Mottram* v. *South Lancashire Transport Co.*, on 29th September (*The Times*, 30th September), the Court of Appeal (MACKINNON, GODDARD and DU PARCQ, L.JJ.) held that there was no evidence of negligence against an omnibus company where a passenger rang the bell of an omnibus to signal it to stop, alighted before it stopped, and as he left gave it the signal, by ringing the bell twice, to start again, so that the plaintiff was injured while alighting from the bus behind the passenger who rang the bell. It was held that the conductress had been guilty of no error of judgment in not going to the top of the stairs or the platform to see that passengers alighted safely, as she could not have prevented the accident even if she had done so.

In *British Italian Trading Co., Ltd.* v. *George Bowles Nicholls and Co., Ltd.*, on 1st October, 1942 (p. 296 of this issue), WROTTESLEY, J., held that where a vendor of goods by a concession as a result of war damage to the purchaser's premises, allowed consecutive deliveries of goods to be "spread over October and November, 1941," without further words, those deliveries must be reasonable as to time and amount; two deliveries each of half the goods consisting of 448 cases in all, were not reasonable, but the purchasers had waived the breach by not objecting in time. Following *Mischeff* v. *Springett*, his lordship further held that although the delivery orders were received by the purchasers before 10th November, if they had been so received after that date, there would have been a sale in contravention of the Food Substitutes (Control) Order, 1941 (S.R. & O., No. 1606).

In *E. J. Mitchell* (*Inspector of Taxes*) v. *Child*, on 1st October (*The Times*, 2nd October), MACNAGHTEN, J., held that a sum of £240 spent by a rector in successfully obtaining the insertion, in an Act of Parliament to acquire his rectory, of a clause providing for alternative accommodation in the same parish and for suitable compensation, was money expended wholly, exclusively and necessarily in the performance of his duties, as it was his duty to reside in the rectory and also his duty as a corporation sole to preserve the property of the corporation, and therefore the money should be deducted in computing his income for income tax purposes.

Procedure in 1942.

SEVERAL recent cases have dealt with *service* of proceedings. Substituted service will not be permitted where the defendant is a prisoner of war in Germany (*Vandyke* v. *Adams*). Service of a divorce petition cannot be dispensed with where the respondent is resident in enemy territory (*Read* v. *Read*). Eire is a British Dominion; a company incorporated in Dublin is a British company and must be served not with notice of a writ, but with the writ itself (*Hume Pipe & Concrete Construction Co., Ltd.* v. *Moracrete, Ltd.*). A statement of claim alleging that the Home Secretary was responsible for the ill-treatment of a "detainee" was struck out against him, with liberty to amend (*Arbon* v. *Anderson*). In an action for damages for wrongful dismissal, where special damages are claimed, particulars of employment and earnings since dismissal may be ordered before delivery of defence (*Monk* v. *Redwing Aircraft Co., Ltd*). Where the head of a government department makes an affidavit that the production of a document would be contrary to the public interest, production must be refused. The court will not look at the document to decide whether production would be wrong (*Duncan* v. *Cammell Laird & Co., Ltd.*). An action cannot stand out indefinitely because the defendant, a serving soldier, and his witnesses are abroad (*Coppin* v. *Bush*). The court itself will take an objection to incompetent proceedings (*Westminster Bank, Ltd.* v. *Edwards*). Where a party repudiates liability under a contract which contains a widely drawn arbitration clause, the arbitration clause remains effective and the court will *prima facie* stay an action (*Heyman* v. *Darwins, Ltd.*). Where one party fails to appoint an arbitrator, the other side must serve him with the statutory notice. If it is not complied with, the applicant's arbitrator should be *expressly* appointed as sole arbitrator (*Drummond* v. *Hamer*).

No Dispensing with Service.

(*a*) *Prisoner of War in Germany.*—Leave will not be granted to serve notice of a writ upon a prisoner of war in Germany by service of the notice on his solicitors who have no power of attorney to act for him nor are bound to communicate with him. Nor can service be dispensed with under Ord. IX, r. 14B, for the defendant is not an "enemy" within the meaning of the Trading with the Enemy Act, 1939 (*Vandyke* v. *Adams* [1942] 1 All E.R. 139, *per* Farwell, J.).

The plaintiff, in 1929, agreed to assign a lease to the defendant for the remainder of his term, to pay him £550 and to invest £300 in the joint names as security for the performance of the covenants, this sum to belong to the defendant at the end of the lease upon due performance. The defendant sub-let part of the premises upon receipt of a high premium. Since 1939 rent was in arrear but the plaintiff, under his lease, paid the lessor. He issued a writ claiming that the £300 in the joint names, by reason of the defendant's breach of covenant, should be released to him. The defendant became a prisoner of war and the plaintiff now sought leave to serve notice of a writ upon the solicitors who had acted for him on the assignment. They held no power of attorney.

Although a member of the firm was a relative of the defendant, there was no "reasonable probability or certainty that the notice of the action will be brought to the knowledge of the defendant. The solicitors are not under any duty to communicate with the defendant" (at p. 141). Whether they would write to him, and, if so, whether he would get their letter, was speculative (see also *Porter* v. *Freudenberg* [1915] 1 K.B. 857, and the judgment of Lord Reading, C.J., and *Re Churchill and Lonberg* (1941), 3 All E.R. 137, 138, *per* Sir Wilfrid Greene, M.R.).

Under Ord. IX, r. 14B, service can be dispensed with, upon certain conditions (here satisfied), if the defendant is an "enemy" within the Trading with the Enemy Act, 1939. By s. 2, "enemy" means, *inter alia*, a person "resident" in enemy territory. In one sense, the defendant, as a prisoner of war, was so "resident"—albeit against his will. But one must consider "the whole purpose of the Act."

> "I cannot hold that a soldier of His Majesty's Army who has the misfortune to be taken prisoner during the war, and who has since been detained as a prisoner of war in Germany, is an enemy in any sense of the word at all" (at p. 142).

(*b*) *Respondent resident in enemy territory.*—No order will be made dispensing with service, under Ord. IX, r. 14B, on the ground that the respondent is an "enemy." That rule has not been imported into the Matrimonial Causes Rules, 1937 (*Read* v. *Read* (1942), 1 All E.R. 226 (C.A.)).

A husband petitioner had asked leave, by summons, to have service on the respondent dispensed with on the ground that she was an "enemy" within the Trading with the Enemy Act, 1939. Now Ord. IX, r. 14B, para. 4, provides that the rule applies to proceedings other than actions begun by writ. By r. 81 of the Matrimonial Causes Rules, 1937, the rules of the Supreme Court apply with modifications, and *subject to the Matrimonial Causes Rules*, to matrimonial proceedings. Hodson, J., held that Ord. IX, r. 14B, applied to matrimonial proceedings but declined to exercise his discretion in the present case.

Now s. 42 of the Matrimonial Causes Act, 1857, gives power to the court to dispense with service, if necessary or expedient. This section has not been repealed and the discretion therefore must be read into r. 10 of the Matrimonial Causes Rules, 1937, which forbids the trial of a petition unless the respondent and every co-respondent and every person named in the petition have entered appearance or it has been shown by affidavit that they have been duly served. Rule 10 is therefore still peremptory, subject to s. 42 only—but not to the discretion imported by Ord. IX, r. 14B.

For another reason, said Lord Greene, M.R., Ord. IX, r. 14B, does not apply to matrimonial causes. Under para. 3 of that rule, Ord. XIII, r. 10, applies to the judgment, i.e., the defendant can come to the court and ask for the judgment to be set aside. This provision is "not a mere accident, nor is it some collateral or subsidiary reason. . . . It is an essential part of the whole conception underlying the rule, and it is a part of the justification for the departure by this rule from our long-standing system" (at p. 229). Now a respondent in divorce proceedings would not have this safeguard. The very subject-matter of r. 14B shows that it was not intended to apply to divorce proceedings.

MacKinnon and Goddard, L.JJ., agreed.

(To be continued.)

A Conveyancer's Diary.

Liability on Covenants.

THE ordinary mortgage contains not only a charge upon the property which is security for the loan, but also a personal covenant by the debtor to pay the principal and interest. A really prudent trustee who is lending money not only keeps within the "two-thirds rule," but aims at lending to someone whose personal covenant is valuable. But in modern conditions trustees are quite often mortgagors as well as mortgagees; money has to be raised for many purposes, and trustees for sale can, like a tenant for life, raise money on mortgage to pay for improvements and various other things beneficial to the settled land (see S.L.A., s. 71). Likewise, an executor may well have to borrow the money necessary to enable him to pay estate duty.

The fiduciary mortgagor clearly has no intention of binding his own assets, and it is therefore the duty of his advisers to make sure that he does not do so. I have in recent years seen two or three cases where this duty had been imperfectly appreciated; in one of these cases the results were strikingly unfortunate.

The first rule is that a covenant expressed to be made by an executor "as executor" is a covenant binding the executor personally and not binding the testator's estate at all. This is one of the most remarkable legal anomalies that I know: it is unusual for a form of words to have, in law, precisely the opposite meaning to that which the user intended.

But I do not think that there is any doubt about the rule; the main authority is *Farhall* v. *Farhall* (1871), L.R. 7 Ch. 123. In that case an executrix, having powers under the will to do so, pledged her testator's title deeds to secure her executorship account with a bank. She then overdrew the account and misapplied a good deal of the money thus obtained. The bank had no notice of the misapplication. The security then proved insufficient to repay the overdraft, and the bank sought to recover the balance from the testator's estate. The Court of Appeal in Chancery rejected this claim, notwithstanding that the widow had explicitly incurred the overdraft as executrix. James, L.J., said that there was no authority under which a person lending money to the executor as such can be entitled to prove along with the testator's other creditors; Mellish, L.J., said that it was plain that "no contract can be made with an executor which will not charge him personally but will charge him *de bonis testatoris*." The learned lords justices evidently took the view that to decide otherwise would open the door to executors borrowing large sums improperly upon the security of their testator's estates and to the damage of the testator's other creditors.

In *Watling* v. *Lewis* [1911] 1 Ch. 414, a connected point arose in regard to trustees. A and B had been in partnership and had mortgaged certain realty, part of the partnership assets, giving the usual covenants. After the deaths of both A and B there had been various negotiations which ended by A's executor releasing the mortgaged realty to B's executors, who covenanted (with A's executor) jointly and severally "as such trustees, but not so as to create any personal liability on the part of them or either of them" to pay the principal and interest and to keep A's executor indemnified. The mortgagees later sold the property for less than the amount of the charge and came against A's executor, under A's personal covenant, for the deficiency. A's executor paid up and then sued B's executors for indemnity under the covenant set out above. Warrington, J., gave judgment for the plaintiff, holding that the proviso, which had sought to nullify the defendants' personal liability, was repugnant to the covenant and so void. The learned judge reached this conclusion on the authority of an older case, *Furnivall* v. *Combes*, 5 Man. & G. 736, but he called attention to, and distinguished, *Williams* v. *Hathaway*, 6 Ch. D. 544, where the opposite result was reached.

In the last-mentioned case fiduciary persons covenanted, so as to bind themselves and their successors in the trust, *but not so as*

to bind themselves, their executors or administrators, after they or he had ceased to be entitled to apply the trust fund. The distinction pointed out by Warrington, J., was between such a covenant as in *Watling* v. *Lewis*, which started off as an ordinary personal covenant and then sought to exclude all personal liability, on the one hand, and, on the other hand, one like that in *Williams* v. *Hathaway*, which was, throughout, a qualified obligation limited to operate only against a fund. The point which he brought out was that it is the very nature of an ordinary covenant that it binds the covenantor personally: if it does not do that, it is not a realty covenant at all. It follows that an attempt to attach to a covenant a proviso *excluding* personal liability must necessarily be repugnant and so void. But a "covenant" expressed to be binding only upon a fund and not upon those who have parted with the fund is not the same thing at all. It is merely a usage of the covenant-form to create a charge on the fund. Though this distinction is perfectly clear and intelligible in theory, it cannot but give rise to extremely difficult practical questions of construction, since one will not necessarily find words as clear, on either side of the line, as those employed in the cases cited.

The lesson to be derived from those cases is, I think, this: the advisers of fiduciary borrowers ought not to allow them to use covenants to repay, lest they make themselves personally liable. Where a fiduciary person has power to borrow he should do so upon terms that the resultant mortgage deed shall contain proper words charging the interest which is to secure the debt, but that there shall not be any personal covenant. If the charge on the specific property is not considered by the mortgagee to be a sufficient security, the proper remedy is to charge other property as well. The consequence will often be that a fiduciary borrower cannot get quite such good terms as would a beneficial owner who was proposing to support the charge by a personal covenant; but that is in the nature of the case, since a fiduciary person cannot reasonably be expected to bring his personal credit to the rescue of the trust estate. If money has to be borrowed for the benefit of a settled fund or estate, the fund or estate itself is the only asset properly available as security. This reasoning applies alike to trust funds and the estates of deceased persons. Where money has to be borrowed for the latter, it is even more necessary to take care to use only words of charge and not of covenant in view of the strictness of the rule stated in *Farhall* v. *Farhall*. If these dangers are not expected and watched for, trustees or executors may well find themselves personally liable to pay back to mortgagees moneys borrowed for the benefit of the estate and in which the trustee or executor has never had a personal interest at all. If that happens, they will hardly thank their legal advisers.

Reviews.

Stone's Justices Manual. Edited by E. J. HAYWARD, O.B.E., Solicitor of the Supreme Court and Clerk to the Justices of the City of Cardiff. 1942. London: Butterworth & Co. (Publishers), Ltd. 47s. 6d. (medium edition); 52s. 6d. (thin edition).

A centenary edition of "Stone's Justices' Manual" is an event in legal history, and if it had not been for the austerities imposed by the war, it might have been celebrated by producing a sumptuously bound edition. We must however be grateful to the publishers for bringing out the usual volume, swollen by war-time legislation, but still the familiar "Stone." In a foreword to the seventy-fourth (Centenary) edition, the Lord Chancellor notes that the original work was suitably named the "Justices' Pocket Manual," as it then consisted of only 212 small pages. It is now more than ten times that length! In the 100 years since Mr. Samuel Stone, Solicitor and Clerk to the Justices of the Borough of Leicester, compiled the work, solicitors and clerks of justices have been associated with it throughout its history. All the recent decisions, as usual, are ably dealt with, and the excellence of the present edition is a guarantee, if guarantee were needed, of a long and distinguished future for a manual that has been tried by the lawyers of a century, and not found wanting.

Books Received.

The War Damage (Amendment) Act, 1942. By T. J. SOPHIAN, of the Inner Temple, Barrister-at-law. 1942. pp. 72 (with Index). London: Jordan & Sons, Ltd. 5s. net.

Montgomery's War Damage (Amendment) Act, 1942. By R. M. Montgomery, K.C. 1942. pp. xxv and 52 (with Index). London: Eyre & Spottiswoode (Publishers), Ltd. 5s. net.

Hill and Redman's Landlord and Tenant. Third Cumulative Supplement to Ninth Edition. By Miss M. M. Wells, M.A., of Gray's Inn, Barrister-at-law. 1942. pp. 147. London: Butterworth & Co. (Publishers), Ltd. 10s. 6d. net.

Loose-leaf War Legislation. Edited by JOHN BURKE, Barrister-at-law. 1942 Volume, Part 5. London: Hamish Hamilton (Law Books), Ltd.

Landlord and Tenant Notebook.

Scope of the Agricultural Holdings Act, 1923.

A OWNS a small piece of land, adjoining a farm, for which he has, owing to the war, no immediate use. It is not such as to attract the attention of the County War Agricultural Committee. But the farmer could produce more food if he held a tenancy of this piece of land. A is willing to grant a tenancy but is deterred by the thought of the Agricultural Holdings Act, 1923. The rights conferred on tenants by this statute may conveniently be divided into two groups, for present purposes: those relating to security of tenure and those relating to unexhausted improvements. But before examining A's problem in detail, it is as well to have a look at the definition of "holding" given in s. 57 (1).

This runs: "does not include an allotment garden or include any land cultivated as a garden unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, save as aforesaid, means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

"Any parcel of land held by a tenant": as far as the definition is concerned, it does not matter how small or for how short a period; so this will certainly not allay A's apprehensions.

Proceeding to examine the provisions which confer security of tenure, the most important enactments are to be found in s. 12, s. 23 and s. 25.

Section 12 provides for compensation for disturbance. The popular notion for which it is responsible is that a farm tenant is entitled to a year's rent if he is given notice. This is not accurate; but without attempting to give even a summary of the section, which is a long one, I may say that roughly it enacts that a farm tenant who leaves in consequence of notice to quit which is not given for a recognised good reason *and* who is thereby put to loss and expense is entitled to compensation, the measure of which is one year's rent if he proves any loss and expense; more, but never more than two years' rent, if he proves that one year's rent is not adequate.

In A's case, if the rent he proposes to ask is a nominal one, s. 12 will not worry him much; apart from the fact that in the particular circumstances there may be no loss or expense. For an example of this happening, see *Minister of Agriculture and Fisheries* v. *Dean* [1924] 1 K.B. 851 (C.A.), the facts of which are admittedly peculiar as the tenant, who had sub-let, proposed to utilise what he recovered for compensating the sub-tenants; and regard should be paid to *Re Agricultural Holdings Act*, 1923. *Dunstan* v. *Benney* [1938] 2 K.B.1 (C.A.), in which, the landlord having alleged bad husbandry, a valuer's fee was held to qualify the tenant for compensation for disturbance, though no other loss or expense had been incurred.

More serious, if A proposes to let "for the duration," is the possible effect of ss. 23 (1) and 25 (1). "In the case of a tenancy for a term of two years or upwards, the tenancy shall not terminate on the expiration of the term for which it was granted, unless not more than one year nor more than two years before the date fixed for the expiration of the term a written notice has been given . . ." And ". . . a notice to quit . . . shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy." Now it seems at present that the only way in which effect can be given to an agreement to let "for the duration" is to construe the agreement as creating a long term but containing an option to break (*G.N. Ry. Co.* v. *Arnold* (1916), 33 T.L.R. 114). Consequently, if the farmer is unwilling to accept (what has sometimes been accepted) a term of just under two years, or a periodic tenancy with periods of less than a year, A must, it seems at first sight, be prepared to be kept out of possession well after the end of the war. But advantage can and should be taken of the exception in s. 25 (2) (*c*): "This section shall not apply to any notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding . . . for some specified purpose, unless that purpose is the use of the land for agriculture." A not being a farmer, it should be possible to agree an option to determine which would be effective.

The provisions governing compensation for improvements are to be found in the first sections of the Act. In some cases consent is a condition precedent to compensation, but it is, of course, with the others that we are concerned. And while in the circumstances visualised there can be no question of any claim in respect of some kinds of improvements, e.g., repairs to buildings, Pt. III of Sched. I, which specifies the "improvements in respect of which consent is not required," does mention others, such as application of purchased manure and laying down temporary pasture (though this must be from seeds sown more than two years before the end of the tenancy), which may cause A some concern. For the measure of compensation is the value of the improvement to an (not "the") incoming tenant.

But here, again, there are certain subsidiary provisions which may at least reduce A's concern. There is s. 8, restricting the

rights of a tenant about to quit: "A tenant of a holding shall not be entitled to compensation . . . in respect of any improvements, other than manuring . . . begun by him (*a*) in the case of a tenant from year to year, within one year before he quits the holding, or at any time after he has received notice to quit which results in his quitting the holding; and (*b*) in any other case, within one year before the end of the tenancy."

The effect of the above is as problematical, it may be, as the duration of the war; and if it discourages the farmer from taking a short or uncertain tenancy, I think the best way in which the parties can achieve their common object is to refer to s. 1 (2) (*a*): "In the ascertainment of the amount of the compensation payable to a tenant . . . there shall be taken into account any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement, whether expressly stated in the contract of tenancy to be so given or allowed or not." Thus, if A and his neighbour agree what is to be done with the piece of land, good draftsmanship should do the rest.

Our County Court Letter.

Fur Coat not a Necessary.

In *Busby's* (*Bradford*), *Ltd.* v. *Garscadden and Wife*, at Bradford County Court, the claim was for £50 as the price of a fur coat. The plaintiff's case was that they had supplied the coat to the female defendant. The case for the male defendant was that the coat was not a necessary, as he paid his wife a dress allowance of 20s. to 25s. a week. He was a doctor, and his wife had had a Persian lambskin coat in December, 1939. She was therefore not entitled to pledge his credit for another fur coat. His Honour Judge Frankland gave judgment for the male defendant, and for the plaintiffs against the female defendant for the amount claimed, with costs. A stay of execution was granted pending the return of the coat to the plaintiffs.

Title to Car Battery.

In *Green* v. *Kershaw*, recently heard at Lichfield County Court, the claim was for £6 5s. as damages for conversion. The plaintiff's case was that in February, 1941, he had taken two car accumulators to the defendant's garage for re-charging. In spite of applications for their return, the defendant still had the accumulators in his possession. The defendant's case was that the plaintiff had been informed that the accumulators were worn out and unfit for re-charging. They had thereafter been left lying about for two months, and were eventually scrapped. An offer had been made to replace them with others of equal value, but the plaintiff had demanded the price of a new battery, to which he was not entitled. His Honour Judge Finnemore held that a garage proprietor was not entitled to scrap a customer's battery without his consent. The defendant was therefore in the wrong, but it did not follow that the plaintiff could claim the cost of a new battery. Judgment was given for the plaintiff for £3 and costs.

Validity of Magistrates' Ejectment Order.

In a case at Chippenham County Court (*Collier* v. *Chivers*) the claim was for damages to trespass, viz., £1 10s. A preliminary objection was taken that the alleged trespass was in pursuance of an order of the Calne magistrates, and the county court had no jurisdiction to act as a court of appeal. The submission was overruled. The plaintiff's case was that he had been the tenant of the defendant, who, in 1936, had applied to the Calne County Court for possession of the house. No order was made, and the tenancy continued until November, 1940, when the Calne justices refused an application on the ground of hardship. An intimation was then given that an order would be made on proof of alternative accommodation, but none was offered on the occasion of another application in May, 1941. The justices then reversed their previous decision, because the landlord had joined the Army. An order was made for possession in two months, but the plaintiff's case was that this was invalid. The Small Tenements Recovery Act, 1838, required the justices to make an order for possession in not less than twenty-one nor more than thirty days. The defendant's case was that the order had been made in accordance with the law, but the period was extended under the appropriate Act. The house in question had been bought through a building society, to whom the defendant paid 10s. a week. His rent and rates for a house elsewhere amounted to 11s. 1d., whereas he only received from the plaintiff 7s. 4½d. per week rent, out of which he paid 2s. 2½d. in rates. The defendant's only income was his Army pay, and £1 18s. a week received by his wife for herself and two children's allowance. His Honour Judge Kirkhouse Jenkins, K.C., observed that the plaintiff had refused an offer of a council house, and would not move into the house now occupied by his landlord, even if it became available. To interfere with the decision of the justices would involve injustice to a soldier's wife. Although the plaintiff had offered to pay 5s. a week, as more rent, the justices' decision did not impose greater hardship on the plaintiff than on the defendant, and was not bad in law. Judgment was given for the defendant, with costs.

To-day and Yesterday.

LEGAL CALENDAR.

5 October.—On the 5th October, 1744, "Thomas Bonney, Thomas Wright, Luke Ryley, John Mackevy and William and Sarah Cox were executed at Tyburn. A rescue having been suspected, they were attended by the sheriff's officers with new broadswords, by the high constable, constables and a party of foot soldiers."

6 October.—On the 6th October, 1792, Samuel Romilly wrote to Lord Lansdowne, with whom he had stayed before travelling to Warwickshire for the quarter sessions: "I have great reason to thank your lordship for making me stay a day longer than I had first intended at Bowood. Besides enabling me to pass one day more very delightfully, it has discovered to me my importance at the sessions, of which I had not before any idea, for when I arrived at Coventry I found that two attorneys had been waiting for me for several hours, and notwithstanding so great a trial of their patience, had not carried their briefs to anyone else. . . . To exchange the society of Bowood for the uncomfortableness of a Coventry inn, and the miserable trifles upon which we are obliged at the sessions to waste our breath, and what we by mutual courtesy call our eloquence was to me quite insupportable." Romilly was then thirty-five years old and had been nine years at the Bar.

7 October.—On the 7th October, 1644, Evelyn, passing through Marseilles, was shown the convicts in the galleys, hundreds of men with shaved heads, chained to their seats and clad only in canvas drawers and red bonnets. He was shown how their rowing was commanded with a nod and a whistle. "After bestowing something on the slaves," the Captain of the Galley Royal "sent a band of them to give us music at dinner where we lodged." Evelyn "was amazed to contemplate how these miserable caitiffs lie in their galley crowded together. . . . Their rising forward and falling back at their oar is a miserable spectacle and the noise of their chains with the roaring of the beaten waters has something of strange and fearful to one unaccustomed to it." The galley he visited "was richly carved and gilded and most of the rest were very beautiful."

8 October.—On the 8th October, 1657, Elias Ashmole, the antiquary, recorded in his diary: "The cause between me and my wife was heard, when Mr. Serjeant Maynard observed to the court that there were eight hundred sheets of depositions on my wife's part and not one word proved against me of using her ill, nor ever giving her a bad or provoking word." The lady lost her case, the court refusing her a separation and alimony: "whereupon I carried her to Mr. Lilly's and there took lodgings for us both."

9 October.—On the 9th October, 1600, the Inner Temple benchers granted an "allowance of 2s. 6d. each weekly, made to John Gorgge, the under cook, Roger Bothbie, the panier man, Henry Branche and John Valley, the two turnbroachers, and Owen, the keeper of Mr. Hare's Court, for eight weeks' watching the House and chambers last summer vacation." It was ordered that "a letter be directed to Mr. John Throgmorton, who was chosen one of the stewards for the Reader's dinner last summer vacation, and that he make not default in paying the charge thereof at his peril."

10 October.—On the 10th October, 1749, John Vicars was condemned to death at Ely for the murder of his wife. Save for a short period as servant to a naval captain, another as an infantryman and another as a smuggler, which ended when he was caught, tried and "acquitted by the indulgence of the court," he had worked all his life as a gardener, mostly at great country houses. Women were always his trouble. He had lost his first job at the house of Thomas Coke, Esq. (afterwards Earl of Leicester), through an intrigue with a married woman. Next he worked in the gardens of Kensington Palace. Subsequently he was employed "in the Earl of Orford's gardens at Chelsea, under Mr. Miller, where he worked for a year; and afterwards worked successively at Robert Man's, Esq., of Linton, near Maidstone, Kent; at the Duke of Bolton's at Hackworth, Hants; at Lady Derby's near Chichester; for Mr. King at Brompton, Middlesex; at Lord Castlemaine's in Epping Forest; for John Husday, near Thorney; for Mr. Beals at Whittlesea; from most of which places he was obliged to abscond for some criminal correspondence with single or married women. He next lived at Adam England's, the sign of the Dolphin at Whittlesea during three years and worked for several gentlemen in the neighbourhood." Unfortunately for him he fell in with an extremely unsteady young woman named Mary Hainesworth. They became lovers and at last, on her pressing him with promises and threats, he married her. They lived very lovingly for a couple of months, but afterwards "words frequently arose between them occasioned by her adhering to bad advice given her by her mother and others, by some of whom, she owned to him, she was advised to poison him." Blows followed. She deserted him, and her mother set her up in the glove-making business, but the two women persecuted him. One day passing her shop "his heart beat with love for her but on the thoughts of her obstinacy and that his life or ruin was what they aimed at, his resentment got the better of his reason." He made as if to

kiss her, smiling, but drew a knife across her throat, saying, "Molly, it is now too late; you should have been ruled in time." He then went out and gave himself up. He said he "could not let her live, nor live without her."

11 October.—In the afternoon of the 11th October, 1760, "Mr. Talbot, a Marshalsea Court Officer, having a writ against one M'Carty, met with him near Drury Lane and told him he had an action against him. M'Carty asked at whose suit and, being informed, he desired the officer to step back into the King's Head ale house, the corner of Princess Street, Drury Lane, and after they had been a few minutes together, without any words being heard between them, M'Carty drew out of his pocket a large knife and stabbed the officer to the heart, after which he made his escape out of the house but was pursued and taken by a soldier in Vere Street, Clare Market, and, being carried before Justice Fielding, was committed to Newgate."

HORSE STEALING.

There was a certain old-world atmosphere about the case of horse stealing, the first for many years, at the Old Bailey recently. For a long time it was a capital offence, though to a prisoner who complained of the hardness of the sentence a judge once explained: "Thou art not hanged only for stealing a horse but that horses may not be stolen." An Old Bailey brief to prosecute a man for stealing a horse in the neighbourhood of Staines was the first ever entrusted to the afterwards famous Montagu Williams. When the day of the trial came on he suffered so much from stage fright that he went to all his colleagues begging them to take it off his hands, but without success. He had a formidable opponent and when he looked at the jury they seemed to dance before his eyes till they looked about four times their number. His case was weak anyway, and he floundered through his opening. Finally, without a moment's hesitation, the jury pronounced a verdict of "Not guilty." In an agony, thinking that a great miscarriage of justice had occurred through his stupidity, he jumped up involuntarily and exclaimed: "My lord, what's to become of the horse?" To this the judge replied looking at him somewhat severely: "What's that to do with you, sir? Don't you think you've done enough?" He left court heartbroken and rushing home to his wife, cried: "My dear, I shall never go to court again. I've mistaken my profession." But he did go back and made a great success.

Obituary.

SIR DAWSON MILLER, K.C.

Sir Dawson Miller, K.C., Chief Justice of Patna from 1917 to 1928, died on Saturday, 3rd October, aged seventy-four. He was educated at Durham School and Trinity College, Oxford, and was called by the Inner Temple in 1891. He practised principally in the Admiralty and Commercial Courts, and took silk in 1912. He was appointed Second Chief Justice of the High Court at Patna in 1917, and received the honour of knighthood in 1918.

MR. O. B. CHALLENOR.

Mr. Oscar Bernard Challenor, solicitor, of Messrs. Challenor and Son, solicitors, Abingdon, Berks, died on Friday, 25th September. He was admitted in 1920, and was clerk to the Abingdon R.D.C.

MR. G. C. HANCOCK.

Mr. George Coulter Hancock, solicitor, of Messrs. Coulter Hancock & Co., solicitors, of Truro, died on Tuesday, 22nd September, aged sixty-eight. He was admitted in 1897, and had been clerk to the Truro R.D.C. for thirty-two years.

MR. H. FOX THOMPSON.

Mr. Henry Fox Thompson, solicitor, of Messrs. J. R. & H. F. Thompson, solicitors, of Whitehaven, died on Monday, 21st September, aged fifty-nine. He was admitted in 1908.

Parliamentary News.

HOUSE OF COMMONS.

Courts (Emergency Powers) Amendment Bill [H.L.].
Read Third Time. [29th September.
Greenwich Hospital Bill [H.L.].
Read Third Time. [29th September.
India and Burma (Temporary and Miscellaneous Provisions) Bill [H.C.].
Read First Time. [30th September.
Local Elections and Register of Electors (Temporary Provisions) Bill [H.C.].
Read Second Time. [30th September.
Prolongation of Parliament Bill [H.C.].
Read Second Time. [30th September.

Sir ARTHUR TREVOR HARRIES, Chief Justice of the High Court in Patna, has been appointed Chief Justice of the High Court in Lahore upon the retirement of Sir Douglas Young on 19th January, 1943. Sir SAIYID FAZL ALI, Puisne Judge of the High Court in Patna, has been appointed Chief Justice of that High Court with effect from the same date. Sir Arthur Harries was called by the Middle Temple in 1922.

Notes of Cases.

HOUSE OF LORDS.

Davies and Another *v.* Powell Duffryn Associated Collieries, Ltd.

Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter and Lord Clauson. 27th April, 1942.

Damages—Measure—Damages recovered by deceased person's estate under Law Reform Act—To be taken into account in assessing dependent's claim under Fatal Accidents Act.

Appeal from a decision of the Court of Appeal (85 SOL. J. 383).

The plaintiffs, the widows of two miners who were killed by an explosion in one of the defendant company's mines, brought an action against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. Lewis, J., gave judgment for the plaintiffs, awarding them £750 and £250, respectively, under the Act of 1934, and £5 each under that of 1846. There were awards of £250 and £225 respectively for the children in each case. The defendants' appeal on the question of liability was dismissed (see 85 SOL. J. 177). The plaintiffs cross-appealed, complaining of the inadequacy of the awards under the Fatal Accidents Act. They contended that as s. 1 (5) of the Act of 1934 provided that "the rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Acts," it was wrong for a judge, in assessing damages under the Fatal Accidents Acts, to take into consideration the amount awarded under the Act of 1934. The Court of Appeal held that the damages awarded under the Act of 1934 had rightly been taken into consideration by Lewis, J., and the plaintiffs now appealed. Their lordships took time.

LORD RUSSELL OF KILLOWEN said that under the Fatal Accidents Acts the balance of loss and gain to a dependent by the death must be ascertained, the position of each dependent being considered separately. It was rightly conceded that the general rule must apply unless some statutory exception to the rule prevented its application. The appellants claimed that a statutory exception was to be found in s. 1 (5) of the Act of 1934. All that that subsection did, according to the language used, was to provide that the rights should co-exist; but he could find no words which would justify him in holding that the subsection purported to alter the measure of the damages recoverable for the benefit of a dependent under the Fatal Accidents Acts. The language of the statute fell far short of that. It was sought to extract some special meaning from the dual phrase "shall be in addition to and not in derogation of." That, it was argued, was not idly tautological, but intentionally cumulative; and the words "not in derogation of" involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Acts. He could see no sufficient ground for reading that subtle hidden meaning into the subsection. He agreed with the Court of Appeal that the words "and not in derogation of" merely emphasised what had been already said, that the rights conferred by one Act were additional to the rights conferred by the other Acts, and that the words were to that extent tautological. Subject to an increase of one of the awards of damages, the appeal was dismissed.

The other noble and learned lords gave concurring judgments.

COUNSEL: *Paull*, K.C., and *Griffith Williams*; *Comyns Carr*, K.C., *Joshua Davies*, K.C., and *Rowe Harding*.

SOLICITORS: *Russell Jones & Co.*, for *Morgan, Bruce & Nicholas*, Pontypridd; *Wm. A. Crump & Son*, for *A. J. Prosser*, Cardiff.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL.

Borman and Others *v.* London and North Eastern Railway Company.

Lord Greene, M.R., MacKinnon and Goddard, L.JJ. 8th May, 1942.

Railways—Amalgamation of Companies—Loss of office—Whether compensation payable if loss not due to amalgamation—Railways Act, 1921 (11 & 12 *Geo. 5, c. 55*), *Sched. III, para. 5.*

Appeal from a decision of Atkinson, J. (86 SOL. J. 126; 58 T.L.R. 153), on a consultative special case stated by the Standing Arbitrator under the Railways Act, 1921.

An award was made in an arbitration between a number of men who had originally been employed by the former Hull and Barnsley Railway Company. After the amalgamation of railway companies by the Act of 1921, they continued their employment under the London and North Eastern Railway Company. In 1938, owing to urgent need for economy, the company dismissed from their employment all the claimants, who then claimed compensation under Sched. III to the Act. The company having refused to pay, the claim was referred to arbitration, this case being stated for the opinion of the court. By Sched. III to the Act, persons who at the date of the passing of the Act had been for not less than five years officers or servants of the constituent companies, and had not before the amalgamation voluntarily retired or been dismissed for misconduct or incapacity, were to become from the date of the amalgamation officers or servants of the amalgamated company. By para. 2, the amalgamated company might abolish the office of any existing officer which they deemed unnecessary. By para. 3, no transferred officer was to "be by reason of such transfer in any worse position in respect to the conditions of his service as a whole . . . as compared with the conditions of service formerly obtaining with respect to him." By para. 5, "every existing officer . . . whose services are dispensed with . . . for any reason not being . . . misconduct or incapacity, or . . . who otherwise suffers . . . pecuniary

loss by reason of the amalgamation . . . shall be entitled to . . . compensation . . . " The arbitrator found that the claimants' services were dispensed with for a reason other than misconduct or incapacity. The question submitted for the opinion of the court was whether the words " by reason of the amalgamation " in para. 5 of Sched. III to the Railways Act, 1921, governed any of the events contemplated by the preceding words of that section other than the words " or who otherwise suffers any direct pecuniary loss." Atkinson, J., held that the words " by reason of the amalgamation " governed all the preceding eventualities specified in para. 5, and, therefore, that the claimants, not having suffered because of the amalgamation, were not entitled to compensation. The claimants appealed.

LORD GREENE, M.R., said that the case was clear. The termination of the claimants' employment had had nothing at all to do with the amalgamation, but had resulted from the ordinary economical working of the railway company, which had found it necessary to reduce staff. The words " by reason of the amalgamation " clearly governed all the preceding cases set out in para. 5. The argument that they did not govern at any rate the words " whose services are dispensed with on the ground that they are not required," which applied to the claimants, could not succeed. The whole scheme of the paragraph was contrary to the claimants' contention, and the language of the paragraph did not support it. The appeal must be dismissed.

MACKINNON and GODDARD, L.JJ., agreed.

COUNSEL: *Macaskie*, K.C., and *Nicholas*; *Cartwright Sharp*, K.C., and *MacKenna*.

SOLICITORS: *Pattinson & Brewer*; *W. H. Hanscombe*.

[Reported by R. C. CALBURN Esq., Barrister-at-Law.]

Gold *v.* Essex County Council.

Lord Greene, M.R., MacKinnon and Goddard, L.JJ.
15th July, 1942.

Negligence—Hospital—X-ray treatment negligently applied by radiographer—Liability of hospital authority—Public Health Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 49), Pt. VI.

Appeal from a decision of Tucker, J.

The plaintiff was received in the defendant county council's Oldchurch county hospital to be treated for warts on the face. The consulting dermatologist of the hospital passed her to the radiology department with a written statement of the nature of the treatment which she was to receive, which consisted in the application of 1,000 units of Grenz rays. She was treated on several occasions by one, Mead, a radiographer, who, in giving her treatment, had protected the child's face with a rubber material lined with lead, placed over a layer of lint. The dermatologist having ordered the number of units applied to be increased to 2,000, Mead, instead of using the screen which he had previously employed, thought that the lint would be sufficient protection. The result was that the plaintiff developed ulcers, which caused permanent disfigurement. The plaintiff, alleging that there had been negligence on the part of Mead, and that the county council, whose servant or agent he was, were responsible to the plaintiff, brought the present action. Tucker, J., holding himself bound to do so by *Hillyer* v. *St. Bartholomew's Hospital Governors* [1909] 2 K.B. 820, decided that, as the hospital authorities had employed a competent and skilled radiographer in the person of Mead, they were not responsible for his negligence in failing to use, on the day of the accident, the same screen as he had employed on previous occasions, the matter involving professional skill as distinct from purely ministerial or administrative duties. He therefore gave judgment for the county council. The plaintiff appealed. (*Cur. adv. vult.*)

LORD GREENE, M.R., said that the two reasoned judgments in *Hillyer's* case, *supra*, those of Kennedy and Farwell, L.JJ., with both of which Cozens-Hardy, M.R., had merely expressed agreement, were divergent in that the latter was based on quite narrow grounds, and the former on propositions of a scope far wider than was necessary for the decision. He (Lord Greene) thought it right in such circumstances to treat the narrower ground as the real *ratio decidendi*. The language of Farwell, L.J., made it clear that he was only considering the position of hospital authorities in relation to what took place in the operating theatre. There was nothing in that judgment to support the view that hospital authorities were not liable for the negligent acts of nurses in the performance of their general duties of a purely administrative or domestic nature, such as giving a patient his meals. It might well be that the principle which he laid down extended to cases where, outside the operating theatre itself, the nurse was acting under the direct instructions of the surgeon or doctor attending the patient. However that might be, the true ground on which a hospital escaped liability for the act of a nurse who, whether in the operating theatre or elsewhere, was acting under the instructions of a surgeon or a doctor was not that she ceased *pro hac vice* to be the servant of the hospital but that she was not guilty of negligence if she carried out the orders of the surgeon or doctor. Farwell, L.J.'s reasoning did not extend to such a case as that of Mead, having regard to the nature of his employment and the circumstances of the accident. Mead did what he did on his own judgment. He was in no sense under the orders of a medical man save as to the nature of the treatment and the dose. There was no authority for Kennedy, L.J.'s proposition, which was only a *dictum*, that the only liability of a hospital was to see that the patient was treated only by experts of whose competence the hospital had taken reasonable care to assure itself, and that those experts should be provided with proper apparatus (*Evans* v. *Liverpool Corporation* [1906] 1 K.B. 160, to which Kennedy, L.J., referred, was no such authority; nor was *Hall* v. *Lees* [1904] 2 K.B. 602, 48 SOL. J. 638). The supposed limitation on the liability of hospitals in respect of members of their staffs (other than doctors and surgeons) when not acting under the direct instructions of doctors or surgeons owed its origin entirely to Kennedy, L.J.'s *dictum*. There was no English authority to prevent the court from giving effect to its own opinion on the question. In each case the first task was to discover the extent of the obligation assumed by the person whom it was sought to make liable. The nature of the work of consulting physicians and surgeons clearly prevented the drawing of the inference that the hospital authorities undertook responsibility for their negligent acts. The same might be true of house physicians, on the permanent staff, but their case was not relevant to the present inquiry. The position of nurses was also not strictly relevant here, but it was analogous. He (his lordship) could not see that hospital authorities did not undertake towards a patient the duty of nursing him as distinct from the obligation of providing a skilful nurse. The idea that in the case of a voluntary hospital the obligation which the hospital undertook to perform by its nursing staff was not the essential work of nursing, but only so-called administrative work, appeared to be unworkable in practice and contrary to the plain sense of the matter. So the obligation assumed by the hospital here was to treat the plaintiff by the hand of Mead with the apparatus provided. In addition to the above considerations, the statutory powers under which the county council maintained the hospital was one of the matters to be considered, although he (his lordship) preferred not to base his decision on so narrow a ground. Having referred to the powers conferred on county councils and local authorities by Pt. VI of the Public Health Act, 1936, his lordship said that if such bodies exercised the powers so conferred on them the obligation which they undertook was to nurse or treat patients, as the case might be; and they were liable if the persons employed by them to carry out that obligation on their behalf acted without due care. It could not be said that a body invested with, and exercising, such powers could be said to be assuming no greater obligation than to provide skilled persons and proper appliances. The appeal would be allowed, the damages being increased from £125 to £300.

MACKINNON and GODDARD, L.JJ., read concurring judgments.

Leave was given to appeal to the House of Lords.

COUNSEL: *Denning*, K.C., and *Safford*; *Berryman*.

SOLICITORS: *Sidney L. Samson*; *Sharpe, Pritchard & Co.*, for *John E. Lightburn*, Chelmsford.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

In re Cobbold's Separation Deed; Cobbold *v.* Davenport.

Farwell, J. 17th July, 1942.

Income tax and sur-tax—Pre-war covenant to pay annuity free of income tax—In November, 1939, *annuitant agrees to take lesser sum for duration of the war—Whether only twenty twenty-ninths of annuity payable—Finance Act*, 1941 (4 *& 5 Geo.* 6, *c.* 30), *s.* 25.

Adjourned summons.

By a deed of separation made the 14th December, 1921, between the husband of the first part, his wife of the second part and trustees of the third part, the husband covenanted that, should his wife survive him, his executors would pay to the trustees in trust for the wife an annual sum of such an amount in each year as would, together with certain other income of hers, after deduction and payment of income tax and super-tax, make up the clear yearly sum of £4,500. The husband died in 1929, having bequeathed his residuary estate to his son. After his death, the wife came to an informal arrangement with the son under which she gave up certain rights under the 1921 deed to have security provided and agreed to accept monthly payments of £375 payable in advance. By a deed made the 30th November, 1939, between the wife of the first part, the son of the second part and the trustees of the husband's will of the third part, expressed to be supplemental to the deed of 1921, after reciting that the son had requested the wife to relieve him from payment of some part of the annual sum having regard to the increase in income tax and sur-tax, the wife agreed with her son and the trustees to accept a deduction of £90 from the next five instalments of the annuity and a deduction of £37 10s. from each monthly instalment due thereafter until the termination of the war. The trustees of the deed of 1921 were not parties to the deed of 1939. By this summons, C, one of the trustees of the deed of 1921 and one of the executors of the husband's will, asked whether the deed of 1939 operated as a variation of the deed of 1921 so as to exclude the operation of s. 25 of the Finance Act, 1941. Section 25 (1) provides that: " . . . any provision . . . for the payment . . . of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which (*a*) is contained in any deed or other instrument . . . and (*b*) was made before the 3rd September, 1939; and (*c*) has not been varied on or after that date, shall, . . . have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof."

FARWELL, J., said that the deed of 1939 did not, in terms, affect the deed of 1921 at all. All it amounted to was a temporary variation, whereby the wife agreed with the son for the duration of the war to accept a lesser sum than she was entitled to under the deed of 1921. Whether this was a variation was the question he had to determine. It was contended that in order to come within s. 25 (1) (*c*) the variation must be a variation of the agreement, so far as it was an agreement to pay a yearly sum free of income tax and sur-tax, and therefore, as the deed of 1939 did not propose to vary that provision, it did not come within the section at all. It was not necessary to determine that, because, in his view, the arrangement of 1939 was not a variation of the deed of 1921. It was merely a temporary arrangement. At the end of the war the deed of 1921 would remain unaltered. Accordingly the provisions of s. 25 applied.

COUNSEL: *J. H. Stamp*; *C. E. Harman*, K.C., and *Valentine Holmes*; *M. G. Hewins*.

SOLICITORS: *Bischoff & Co.*; *Roney & Co.*; *Blount, Petre & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

KING'S BENCH DIVISION.

British Italian Trading Co., Ltd. *v.* George Bowles Nicholls and Co., Ltd.

Wrottesley, J. 1st October, 1942.

Sale of goods—Action for price—Delivery to be "spread over" October and November—Meaning of "spread over"—Order forbidding sale of food substitutes after certain date—When "sale" takes place—Deliveries to be reasonable in absence of express term—Food Substitutes (Control) Order, 1941 (S.R. & O., No. 1606).

Action for the price of goods sold and delivered.

Both parties were provision dealers, and by a contract in writing between them dated 19th March, 1941, and set out in a letter of that date from the plaintiffs to the defendants, it was agreed that the plaintiffs should sell to the defendants 1,000 gross cases of synthetic "onion milk," each containing three dozen bottles at 8s. 7½d. per dozen bottles net, ex London warehouse, delivery commencing in two to three weeks, and concluding in six weeks, payment net cash against delivery order. It was further provided that the contract was subject to discharge by *force majeure*. After some deliveries had been made and paid for, on 3rd May, 1941, the defendants asked the plaintiffs to defer deliveries for a short period, as their premises at Smithfield had been destroyed by enemy action a week previously. After some dispute the parties agreed to terms contained in a letter of 8th July, 1941, to the effect (*inter alia*) that the remainder of the 1,000 gross should "be taken in consecutive deliveries spread over October and November, 1941." These amounted to 448 gross and, on 1st October, a delivery order for 224 gross was delivered to the defendants. Although there was correspondence about other matters on 3rd and 17th October, 1941, it was not until 24th October, 1941, that the defendants denied liability for the 224 gross specified in the delivery order of 1st October, and returned the delivery order. On 27th October, 1941, the plaintiffs replied, refusing to accept the return of the delivery order. On 4th November, 1941, the plaintiffs sent to the defendants a further delivery order for 224 gross bottles, and the defendants replied that, acting on advice, they were asking for a licence from the Ministry of Food to sell the goods. This was because on 11th October, the Ministry of Food made the Food Substitutes (Control) Order, 1941 (S.R. & O., No. 1606), which came into force on 27th October, 1941, under which, except under licence from the Minister, it was forbidden by way of trade or business to engage in the manufacture of any food substitute, and as from 10th November, 1941, it was also forbidden to sell or offer or agree to sell or expose for sale any food substitute unless it had been manufactured under licence. The plaintiffs accordingly obtained a licence and offered it to the defendants, but the defendants replied that they were not allowed to sell the goods.

Wrottesley, J., said that it was contended for the plaintiffs that their delivery orders were clearly before 10th November, and the goods were manufactured before the order was made, and therefore the licence permitted the sale. That argument was unacceptable, as the order made the goods unsaleable after 10th November, and no amount of licences granted under the order could make dealings in the goods legal. In *Mischeff* v. *Springett* (1942), 2 All E.R. 348, a Divisional Court held that there was a sale of goods within the Sale of Goods Act, 1893, and the Canned Sardines (Maximum Prices) Order, 1941, when the goods were appropriated to the contract and the property passed to the buyer (i.e., when the buyer received an invoice and deilvery order). In this case it was clear that there was a delivery before 10th November. It remained to be decided whether the plaintiffs were entitled to make the deliveries which they did under the amended agreement. The defendants said that the words "spread over" imported that the buyers could postpone calling for any part of the goods until the end of November, and called parol evidence of custom, citing *Hutton* v. *Warren*, 1 M. & W. 466. That evidence was not within the decision cited, and that defence failed. There was, however, an alteration of the original delivery terms of the contract, granting concessions to the defendants, and the words of the new agreement (of 8th July) meant what they said, viz., that the defendants must take the goods in a number of deliveries spread over October and November. As there was no express term as to the precise amounts and times of deliveries, they must be implied to be reasonable, and what the plaintiffs did was not reasonable. By their conduct, however, the defendants agreed to and accepted the deliveries, and there must be judgment for the plaintiffs for the amount claimed.

Counsel: *The Hon. Hubert Lister Parker; N. R. Fox-Andrews.*

Solicitors: *Travers, Smith, Braithwaite & Co.; Theodore Goddard and Co.*

[Reported by Maurice Share, Esq., Barrister-at-Law.]

War Legislation.

Statutory Rules and Orders, 1942.

No. 1935. **Aliens** (Movement Restriction) (No. 4) Order, Sept 22.
No. 1936. Aliens (Protected Areas) (No. 3) Order, Sept. 22.
E.P. 1961. **Apparel and Textiles.** Woven Non-Wool Cloth (Manufacture and Supply) (No. 2) Directions, 1942. General Licence, Sept. 17, *re* certain Furnishing Fabrics.
E.P. 1928. **Control of Fuel** Order, 1942, General Direction (Central Heating and Hot Water Plants) No. 1, Sept. 19.
E.P. 1929. Control of Fuel Order, 1942, General Direction (Central Heating and Hot Water Plants) No. 2, Sept. 19.
E.P. 1930. Control of Fuel Order, 1942, General Direction (Standard of Lighting) No. 1, Sept. 19.
E.P. 1937. Control of Maps (No. 3) Order, Sept. 22.
E.P. 1926. Control of Packaging (No. 2) Order, Sept. 19.
E.P. 1964. Control of Paper (No. 49) Order, Sept. 25.
E.P. 1965. Control of Paper (No. 50) Order, Sept. 23.
No. 1979. Control of Paper (No. 51) Order, Sept. 25.
No. 1907. **Customs.** Export of Goods (Control) (No. 39) Order, Sept. 21.
E.P. 1927. **Electricity Minimum Charges** Order and General Direction, Sept. 19.
E.P. 1933. **Emergency Powers** (Defence) Road Vehicles and Drivers (Amendment) Order, Sept. 15.
E.P. 1982. **Fish** (Distribution) Order, Sept. 26.
E.P. 1981. Fish (Port Allocation Committees) Order, Sept. 26.
E.P. 1983. **Food Transport** Order, 1941. Directions, Sept. 26.
E.P. 1984. **Footwear Repairs** (Control) Order, Sept. 28.
No. 1978. **Goods and Services** (Price Control). Maximum Prices and Maximum Charges Orders (Misc. Amendments) Order, Sept. 29.
E.P. 1962. **Ice Cream** (Prohibition of Manufacture and Sales) Order, Sept. 24.
E.P. 1918. **Making of Civilian Clothing** (Restrictions) (No. 8) Order, 1942. General Licence, Sept. 19.
E.P. 1919. Making of Civilian Clothing (Restrictions) (No. 14) Order, Sept. 23.
No. 1996. **National Health Insurance** (Arrears) Amendment Regs. (No. 2), Sept. 14.
E.P. 1860. **Navigation** Order No. 16, Sept. 22.
No. 1968/S.48. **Police** (Scotland) Regulations, Sept. 3.
No. 1969/S.49. Police (Women) (Scotland) Regulations, Sept. 3.
No. 1970. **Seasonal Employments** (Income Tax) Regulations, Sept. 24.
No. 1975/S.50. **Special Constables** (Scotland) Order in Council, Sept. 17.
No. 1972/L.27. **Supreme Court, England.** Procedure. Principal Probate Registry (Non-Contentious Business) Order, Sept. 15.
No. 1886. **Weights and Measures** (Amendment No. 5) Regulations, Sept. 16.

Board of Trade.

Trading with the Enemy. Legislation in force in the United Kingdom on 1st July, 1942. 6d. (7d.).

Rules and Orders.

S.R. & O., 1942, No. 1972/L.27.

SUPREME COURT, ENGLAND—PROCEDURE.

The Principal Probate Registry (Non-Contentious Business) Order, 1942. Dated September 15, 1942.

I, John Viscount Simon, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by the Administration of Justice (Emergency Provisions) Act, 1939,* and all other powers enabling me in that behalf, and with the concurrence of two other Judges of the Supreme Court, do hereby order as follows:—

1. The following paragraph shall be inserted after paragraph 2 of the Principal Probate Registry (Non-Contentious Business) Order, 1940,† as amended by the Principal Probate Registry (Non-Contentious Business) (No. 2) Order, 1940‡:—

"2A.—(1) Local offices of the Principal Probate Registry shall be established at such places as the President may direct for the deposit and preservation during the present war of original Wills and other documents of a date prior to the year 1800.

(2) No original Will or other document deposited at any local office so established shall be open to inspection nor shall any copy thereof be supplied save in exceptional circumstances and with the leave of the President."

2. This Order may be cited as the Principal Probate Registry (Non-Contentious Business) Order, 1942.

Dated the 15th day of September 1942. *Simon*, C.

We concur *Merriman*, P.
S. O. Henn Collins, J.

* 2 & 3 Geo. 6, c. 78. † S.R. & O. 1940 (No. 1672) I, p. 1004.
‡ S.R. & O. 1940 (No. 1861) I, p. 1005.

Notes and News.

Honours and Appointments.

The Lord Chancellor has appointed Mr. F. S. Butter, O.B.E., Registrar of the Shrewsbury, Whitchurch, Market Drayton, Bridgnorth and Madeley County Courts, to be in addition the Registrar of Wellington (Salop) County Court as from the 1st October, 1942. Mr. Butter was admitted in 1912.

Mr. C. V. Thornley, Acting Town Clerk of East Ham, has been appointed Town Clerk. He was admitted in 1935.

Note.

The next quarterly meeting of the Lawyers Prayer Union will be held (by kind permission) in the Council Room of The Law Society, Chancery Lane, on Monday, 19th October, 1942, at 5.45 p.m. (tea at 5.15 p.m.). The chairman will be Sir George H. Hume, J.P., M.P., and the special speaker Lieut.-General Sir William Dobbie, G.C.M.G., K.C.B., D.S.O. (late Governor of Malta). His subject will be "Christ in the Conflict." Further particulars may be obtained from The Hon. Secretary, Spencer House, Tadworth, Surrey. All lawyers, bar students, articled clerks and friends are invited.